IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 4, 2009 Session

GERALD J. TROSPER, SHERRY GARMAN AND MICHAEL GARMAN v. CHEATHAM COUNTY PLANNING COMMISSION AND LEIGH ANN RICHARDS REPRESENTING THOMAS G. DRENON AND JULIANNE B. DRENON

Appeal from the Chancery Court for Cheatham County
No. 14178 George Sexton, Chancellor

No. M2009-01262-COA-R3-CV - Filed January 19, 2010

Residents of Cheatham County brought a petition for a common law writ of certiorari seeking review of the County Planning Commission's actions granting a variance from the County's lot ratio regulations and, based on the variance, approving the subdivision of a single parcel into an eight lot subdivision located near their residences. The Chancery Court dismissed the petition finding that the petitioners lacked standing. Finding that petitioners have standing to pursue the writ, we reverse the judgment and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed and Remanded

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTELL, P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

William B. Herbert, IV, Nashville, Tennessee, for the appellants, Gerald J. Trosper, Sherry Garman, and Michael Garman.

Benjamin H. Perry, Ashland City, Tennessee, for the appellees, Chatham County Planning Commission and Leigh Ann Richards representing Thomas G. Drenon and Julianne B. Drenon.

OPINION

I. Background

Gerald J. Trosper, Sherry Garman and Michael Garman ("the Petitioners") filed a petition for writ of certiorari in the Chancery Court of Cheatham County, seeking review of the Cheatham County Planning Commission's decision granting a variance from the 1:4 width to depth lot ratio regulation for a parcel of property located on Old Charlotte Pike in Pegram; the Commission also approved the final plat subdividing the parcel into eight subdivided lots based upon the variance.

The petitioners, who live on Old Charlotte Pike near the subdivided lot, alleged that the action of the Planning Commission was arbitrary, capricious and illegal because the Planning Commission failed to comply with the requirements of section 1-111 of the Cheatham County Subdivision Regulations, which require the Planning Commission to make specific findings that the conditions upon which a variance request is based are unique to the property and are not applicable generally to other properties. The petition alleged that the property owners, Thomas and Julianne Drenon, "platted more lots within the subdivision than the subject property would otherwise legally allow thus resulting in long, narrow lots that violate the 1:4 lot ratio regulation." The petition further alleged that the Planning Commission "made no finding of conditions unique to the subject property that would qualify the subdivision for a variance from the 1:4 lot ratio regulation." Consequently, the petition alleged, the Planning Commission's action granting the variance violated section 1-111(2) of the Cheatham County Subdivision Regulations and should be set aside.

The Planning Commission responded to the petition by filing a motion to dismiss on the ground that the petitioners lacked standing to prosecute the petition. The petitioners thereafter amended their petition[1] adding factual allegations supporting their assertion that they were aggrieved by the Planning Commission's action; the additional allegations included the following:

> A. Decreased property value and adverse effect upon the character of the neighborhood as a result of smaller lot dimensions and smaller homes being located within the neighborhood;
> B. Decreased property values and adverse effect upon the character of the neighborhood as a result of increased home density within the neighborhood;
> C. Decreased or inadequate water pressure within water lines that already have low water pressure problems;

[1] As used herein, the term "petition" shall mean the petition, as amended, filed in the trial court.

D. Driveway safety hazards due to limited sight distance along Old Charlotte Pike;
E. Increased traffic along Old Charlotte Pike.

The petitioners also filed a response to the motion to dismiss. A hearing was held following which the trial court found that the petitioners did not have standing to prosecute their petition and dismissed the action. The petitioners appeal.

II. Discussion

This case was resolved in the trial court on a motion to dismiss pursuant to Rule 12.02(6), Tenn. R. Civ. P. The purpose of a Tenn. R. Civ. P. 12.02(6) motion to dismiss is to determine whether the pleadings state a claim upon which relief can be granted. A Rule 12 motion only challenges the legal sufficiency of the complaint. It does not challenge the strength of the plaintiff's proof. *See Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 986 S.W.2d 550, 554 (Tenn. 1999). In reviewing a motion to dismiss, we must liberally construe the complaint, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences. *Pursell v. First American National Bank*, 937 S.W.2d 838, 840 (Tenn. 1996); *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696-97 (Tenn. 2002). Thus, a complaint should not be dismissed for failure to state a claim unless it appears that the plaintiff can prove no set of facts in support of his or her claim that would warrant relief. *See Doe v. Sundquist*, 2 S.W.3d 919, 922 (Tenn. 1999); *Fuerst v. Methodist Hospital South*, 566 S.W.2d 847, 848 (Tenn. 1978). Making such a determination is a question of law. Our review of a trial court's determinations on issues of law is *de novo*, with no presumption of correctness. *Frye v. Blue Ridge Neuroscience Center, P.C.*, 70 S.W.3d 710, 713 (Tenn. 2002); *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000).

Initially, petitioners contend that the Planning Commission waived its right to challenge their standing because the issue was not raised during the meeting at issue; rather it was raised for the first time in response to the petition for writ of certiorari. Relying on *City of Brentwood v. Metro. Bd. of Zoning Appeals*, 149 S.W.3d 49 (Tenn. Ct. App. 2004) and *Sumner v. Metro. Board of Public Health*, No. M2005-01820-COA-R3-CV, 2006 WL 2265095 (Tenn. Ct. App. Aug. 7, 2006), the petitioners assert that, because they were allowed to speak during the meeting, the Commission waived its right to challenge their standing to seek judicial review of their decision. They contend that the standard set forth in *City of Brentwood* and *Sumner* requires the issue of an applicant's standing to be raised during the administrative agency's proceeding to preserve the issue on appeal, and that such requirement "should be applied evenly to all parties that appear before the board or commission, not just the applicant."

We decline to extend the requirement as suggested by the petitioners. Here, the petitioners were not "applicants" submitting to the Planning Commission's authority. Their participation was limited to speaking in opposition to the Drenons' application during the portion of the Planning Commission's meeting that was opened to the public for general comments prior to the Commission's vote on the application. Petitioners did not seek to invoke the Commission's authority; consequently, the question of their standing was not a consideration before the Commission. The trial court, however, had an independent obligation to ensure that the petitioners had standing to seek judicial review of the Commission's decision. *See Metro. Air Research Testing Auth., Inc. v. The Metro. Gov't of Nashville and Davidson Cty*, 842 S.W.2d 611, 615 (Tenn. Ct. App. 1992) ("Standing is a judge-made doctrine used to determine whether a party is entitled to judicial relief. . . . It requires the court to decide whether the party has a sufficiently personal stake in the outcome of the controversy to warrant the exercise of the court's power on its behalf.") (internal citations omitted).

The doctrine of standing is employed by courts to determine whether a particular litigant has a personal stake in the outcome of the controversy to warrant the exercise of the court's power on his or her behalf. *See American Civil Liberties Union of Tenn. v. Darnell*, 195 S.W.3d 612, 620 (Tenn. 2006) (citing *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)); *Metro. Air Research Testing Auth., Inc.,* 842 S.W.2d at 615. The doctrine, "grounded upon 'concern about the proper-and properly limited-role of the courts in a democratic society,'" precludes courts from adjudicating an action when a party's rights have not been invaded or infringed. *See American Civil Liberties Union of Tenn.,* 195 S.W.3d at 620. (citing *Warth*, 422 U.S. at 498). In order to establish standing a plaintiff must show: (1) a distinct and palpable injury that is more than conjectural or hypothetical; (2) a causal connection between the claimed injury and the challenged conduct; and (3) that the alleged injury is capable of redress by a favorable decision of a court. *Id.*

In land use cases, the concept of "aggrievement" supplies the "distinct and palpable injury" required to have standing to maintain an action. *City of Brentwood v. Metro. Bd. of Zoning Appeals*, 149 S.W.3d 49, 58 (Tenn. Ct. App. 2004). Tenn. Code Ann. § 27-9-101 authorizes any person who is "aggrieved" to seek judicial review of appeal "any final order or judgment of any board or commission functioning under the laws of this state" in the courts. Tenn. Code Ann. § 27-9-101; *see also Roberts v. State Bd. of Equalization*, 557 S.W.2d 502 (Tenn. 1977). For purposes of Tenn. Code Ann. § 27-9-101, "to be 'aggrieved,' a party must be able to show a special interest in the agency's final decision or that it is subject to a special injury not common to the public generally." *Wood v. Metro. Nashville & Davidson Cty Gov't*, 196 S.W.3d 152, 158 (Tenn. Ct. App. 2006) (citing *Buford v. State Bd. of Elections*, 206 Tenn. 480, 484, 334 S.W.2d 726, 728 (1960); *League Cent. Credit*

Union v. Mottern, 660 S.W.2d 787, 791-92 (Tenn. Ct. App. 1983)); *McRae v. Knox Cty,* No. E2003-01990-COA-R3-CV, 2004 WL 1056669, at *3-4 (Tenn. Ct. App. May 07, 2004) (citing *Town of East Ridge v. City of Chattanooga*, 191 Tenn. 551, 235 S.W.2d 30 (Tenn.1950)). This court has held that the extension of the authority to appeal and seek judicial review to all persons who are "aggrieved" reflects a legislative intention to ease the strict application of the customary standing principles. *City of Brentwood*, 149 S.W.3d at 57 (citing *Federal Election Comm'n v. Akins*, 524 U.S. 11, 19, 118 S.Ct. 1777, 1783, 141 L.Ed.2d 10 (1998)). Consequently, Tenn. Code Ann. § 27-9-101 should be interpreted broadly rather than narrowly. *Id.* (citing 8A Julie Rozadowski & James Solheim, *The Law of Municipal Corporations* § 25.318, at 666 (3d ed., rev. vol. 1994)); *Roten v. City of Spring Hill*, No. M2008-02087-COA-R3-CV, 2009 WL 2632778, at *3 (Tenn. Ct. App. Aug. 26, 2009).

The primary focus of a standing inquiry is on the party, not on the merits of the claim; however, whether a party has standing "often turns on the nature and source of the claim asserted." *Metro. Air Research Testing Auth., Inc.*, 842 S.W.2d at 615. Thus, a "careful judicial examination of the complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted," is required. *Id.*

With respect to standing, the petitioners contend that they are aggrieved by the final action of the Planning Commission because they live in close proximity to the development and are subject to special injuries not common to the public generally. The petitioners also contend that they have standing because they "were parties to the proceeding before the Planning Commission to the same extent as the Drenons" since they made arguments to the Planning Commission either personally or through counsel during the meeting. In response, the Planning Commission asserts that mere proximity to the development does not confer standing on petitioners, that the injuries alleged are "purely conjectural or hypothetical" and that petitioners were not "parties" to the proceeding.

According to the petition, as amended, which we must accept as true, *see Pursell*, 937 S.W.2d at 840; *Trau-Med of Am., Inc.*, 71 S.W.3d at 696-97, petitioners "reside on the same street and in close proximity" to the subdivided lot at issue and that the variance resulted in smaller lot dimensions and, thus, smaller homes with greater home density within the neighborhood. As a result, they allege, the variance will cause them to suffer a diminution in their property values and an adverse effect upon the character of their neighborhood, decreased or inadequate water pressure within water lines that already have low water pressure, and an increased risk of safety hazards due to limited sight distance along Old Charlotte Pike and increased traffic along the road. The Planning Commission asserts that proximity to the property alone does not confer standing. The Commission also asserts that "the division of the land itself is the only action the petitioners can allege caused any

supposed injury," that the mere division of the land could not cause the injuries alleged in the petition, and that because the injuries alleged in the petition have not yet occurred, they are merely "hypothetical or conjectural." As a consequence, the Commission contends that petitioners have failed to demonstrate they have standing to pursue the writ.

Taking the allegations of the petition as true, we find that the petitioners have alleged a special interest in the Planning Commission's decision to subdivide the parcel of land because of the way such a change may affect the character and nature of the neighborhood and that they have alleged injuries, that if proven true, would be a special injury suffered by them because of their proximity to the subdivision and that would not be common to the public generally. Consequently, they are "aggrieved" within the meaning of Tenn. Code Ann. § 27-9-101. We also find that the allegations of injury contained in the amended petition, cited above, are threatened injuries and causally related to the conduct challenged. *See e.g., Roten*, 2009 WL 2632778, at *3 (finding that adjacent property owners had standing to seek judicial review of the planning commission's site development review and approval process prior to construction of a planned development); *City of Brentwood*, 149 S.W.3d at 59 (finding that the city of Brentwood had standing to seek judicial review of the Metropolitan Board of Zoning Appeals' decision to issue a building permit prior to the erection of the billboard for which the permit was sought); *Citizens for Collierville, Inc. v. Town of Collierville*, 977 S.W.2d 321 (Tenn. Ct. App. 1998) (explaining that to have standing a petitioner must allege that it is "suffering immediate *or threatened* injury as a result of the challenged action." (emphasis added)) (citing *Rains v. Knox Cty Bd of Commissioners*, C.A. No. 711, 1987 WL 18065, at *1 (Tenn. Ct. App. Oct.9, 1987); *Sierra Club v. Morton*, 405 U.S. 727, 734-741, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972)).

Petitioners point out that there are two cases, *Wood v. Metro. Nashville & Davidson Cty Gov't*, *supra*, and *City of Brentwood v. Metro. Bd. of Zoning Appeals*, *supra*, which, they contend, hold that being a "party" to the administrative proceeding is an additional requirement to have standing to seek review pursuant to a writ of certiorari.[2] Relying on

[2] *Wood* states that in addition to being "aggrieved," "[t]he party must also show that it was a party to the agency proceedings sought to be reviewed." *Wood*, 196 S.W.3d at 158 (citing *City of Brentwood*, 149 S.W.3d at 57; *Horton v. Tennessee Dep't of Corr.*, No. M1999-02798-COA-R3-CV, 2002 WL 31126656, at *4 (Tenn. Ct. App. Sept. 26, 2002)). *City of Brentwood* states that "[i]n addition to this statutory requirement [Tenn. Code Ann. § 27-9-101], persons seeking judicial review of a board of zoning appeals decision must have been parties to the proceeding before the board." *City of Brentwood*, 149 S.W.3d at 57 (citing *Levy v. Board of Zoning App.*, No. M1999-00126-COA-R3-CV, 2001 WL 1141351, at *5 (Tenn. Ct. App. Sept. 27, 2001). While *Levy*, citing Tenn. Code Ann. § 27-9-104, states that parties to an administrative proceeding continue to be parties to a review under a writ of certiorari, it does not stand for the proposition that to have standing to file a petition for review of a final decision of any board or commission a petitioner

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these cases, the petitioners argue that they were "parties" to the administrative proceeding from which they seek certiorari review because they attended and spoke during the meeting at which the Commission granted the variance and approved the subdivision plat. The petitioners also point out, however, that *McRae v. Knox Cty*, *supra*, a case involving the Knox County Board of Zoning Appeals and decided in the same year as *City of Brentwood*, found that adjacent property owners who suffered a special injury not common to the public generally had standing to prosecute the writ even though they did not participate in or even attend the board hearing.

The petitioners in both *City of Brentwood* and *Wood* sought certiorari review of the action of an administrative body on an appeal to that body rather than a review of the original action of the body. *Wood*, which was not a land use case, found that the petitioner did not have standing to seek review of the Metropolitan Board of Health's approval of a settlement between a defunct thermal transfer plant and the Metropolitan Department of Health because the petitioner was not a party to the proceeding pending before the board which led to the settlement; the court also held the petitioner was not entitled to participate as an affected party, within the meaning of Tenn. Code Ann. § 27-9-110, since he had only generalized grievances. *Wood*, 196 S.W.3d at 158-159. *City of Brentwood* found that four individual landowners who sought to join the City in seeking review of an action of the Board of Zoning Appeals did not have standing because, unlike the City, they had not appealed the issuance of a building permit by the zoning administrator to the Board and had not attempted to intervene as "affected parties" in the appeal proceeding. *City of Brentwood*, 149 S.W.3d at 59-60.

The holding in *City of Brentwood* and *Wood* that a petitioner seeking review pursuant to a writ of certiorari must have been a party to the administrative proceeding below is not applicable here as the procedural posture of those cases distinguish them from the present case. We find no requirement in the statute or under the standing doctrine that a citizen seeking certiorari review of the decision of the responsible governmental board or commission to grant a variance in a land use matter must have been a "party" to the board or commission hearing or proceeding, when that citizen otherwise meets the standing requirements.[3]

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[2](...continued)
must have been a "party" to the hearing, meeting, or other proceeding during which the final decision was made. *See Levy*, 2001 WL 1141351, at *5.

[3] Moreover, the record does not show what, if any, procedural steps the petitioners could or should have followed to become "parties" to the meeting or that the Planning Commission made any such procedures or the consequence of not becoming a "party" to the meeting known to the petitioners.

As aforestated, the purpose of the standing doctrine is to determine whether a particular litigant has a sufficiently personal stake in the outcome of the controversy to warrant the exercise of the court's power on its behalf. *See American Civil Liberties Union of Tenn.*, 195 S.W.3d at 620. In land use cases, the standing doctrine under the common law has been modified by statute, *see* Tenn. Code Ann. § 27-9-101, enabling those who may be "aggrieved" by the decision of an administrative body to seek judicial review of the agency's decision, not merely those who have a "distinct and palpable injury." This enactment served to broaden the scope of who has standing in land use cases. *See Wood*, *supra*; *City of Brentwood*, *supra*. Petitioners have alleged sufficient facts to establish their standing.

III. Conclusion

For the foregoing reasons, we reverse the judgment of the trial court dismissing the case and remand the case with instructions for the trial court to issue the writ as prayed for in the petition and to review the action of the Cheatham County Planning Commission.

Costs of the appeal are assessed to the Cheatham County Planning Commission and LeighAnn Richards representing Thomas G. Drenon and Julianne B. Drenon, equally.

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RICHARD H. DINKINS, JUDGE